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No. 90-1947

In the Supreme Court of the United States

October Term, 1991

JOHN K. YEE, et al.,

Petitioners,

v.

THE CITY OF ESCONDIDO,

Respondent.

On Writ of Certiorari to the Fourth Appellate District, Division One Court of Appeal for the State of California

BRIEF AMICUS CURIAE OF THE CITY OF SANTA MONICA, COUNTY OF SANTA BARBARA AND THE SANTA MONICA RENT CONTROL BOARD IN SUPPORT OF RESPONDENT

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Pursuant to Supreme Court Rule No. 37.5, and with the permission of the parties, the City of Santa Monica, the County of Santa Barbara, and the Santa Monica Rent Control Board, respectfully submit this brief amicus curiae in support of the City of Escondido.

INTEREST OF AMICI

Amici support the City of Escondido in urging affirmance of the California Court of Appeal, and join in the policy concerns expressed in the City of San Jose and Local Government Association briefs. Amici write separately to stress vital aspects of the law of possessory takings, particularly as they apply to the unique factual setting of this case.

Amici have enacted rent control and other land use laws as a result of rapidly rising rents, a severe housing shortage, and a desire to protect elderly and low and moderate income tenants from homelessness. These mea-

sures are particularly necessary in southern California which suffers from a crisis in the affordable housing market. Amici's efforts are consistent with the long recognized duty of governments to provide for the housing needs of all segments of their communities.

Amici must also respond to a wide variety of difficult and often hotly contested land use issues. Long observed standards of takings jurisprudence, which petitioners would jettison, have provided the necessary flexibility for local governments to balance these competing interests. Accordingly, amici urge the continued vitality of these principles in a ever more complicated society.

SUMMARY OF ARGUMENT

The Escondido mobilehome rent control ordinance ("Ordinance") is an unexceptional form of price control. While it may affect the value of regulated property, it neither denies economically viable use nor imposes an unwanted use on property. Therefore, it is neither a "regulatory" nor "possessory" taking. That tenants occupy land and pay fair rent—precisely the owner's intended use—does not transform their tenancies into physical invasions. The property rights theory conceived in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *cert. denied*, 485 U.S. 940 (1988), which is the basis for petitioners' cause of action, is contrary to well-established takings doctrine.

Escondido has imposed rent control on mobilehome spaces. It has neither compelled a particular use, nor secured any form of possessory rights to tenants. Tenure flows from the state Mobilehome Residency Law ("MRL"), whose validity is only indirectly before the Court, insofar as petitioners neither sought relief from the MRL, nor sued the state. Nonetheless, amici agree with petitioners that the Ordinance must be considered against the backdrop of the

MRL, which predated the Ordinance's adoption and defined the contours of petitioners' property rights. Viewed in context, the incremental effect of the Ordinance is de minimus on these rights or petitioners' expectations. Moreover, it is a regulatory effect. In an attempt to overcome regulatory takings law, petitioners struggle to portray the Ordinance as an interference with possessory rights. Yet, it neither transfers, abrogates, nor affects any possessory interest.

The Ordinance regulates rent increases. Thus, it tempers the effects of inflation, monopoly, and other market shortcomings on housing costs, which distort appreciation in land values. As described by petitioners, the combined effect of the Ordinance and MRL is to permit tenants to "monetize" some of the appreciated value. Regardless of the truth of petitioners' claim, the constitution does not mandate that fee owners receive maximum appreciation. The state, which defines property in the first instance, has reposed ancillary value in tenants, rather than landlords. The Fifth Amendment is indifferent to this distribution of economic benefit, particularly where the state, through other reciprocal land use regulations, has created substantial appreciated value in the first place.

Even if future appreciation constitutes Fifth Amendment property, it is neither discrete nor severable. Cases holding that extinction of discrete property interests is a taking are inapposite. Rather, the denial of appreciated value must be considered in relation to the remainder of petitioners' property rights. Moreover, even if the Ordinance caused a taking, it occurred at the inception of the law, prior to the appreciation. At that time, it was fully compensated through the provision of fair rents. Value occurring and realized by tenants subsequent to the taking is not compensable.

INTRODUCTION

Seventy years ago, this Court sustained stringent rent and eviction controls against Fifth and Fourteenth Amendment claims. In *Block v. Hirsch*, 254 U.S. 135 (1921), Justice Holmes assumed the District of Columbia Rents Act would "deprive [the landlord] of the power of profiting" from scarce housing resources, "a right usually incident to fortunately situated property." *Id.* at 157. Nonetheless, the Court held that the controls went "little if at all farther" than other forms of economic regulation. *Id.*

> The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay. *Id.* at 155.

To Justice Holmes, protecting tenants from landlord profiteering was not only a proper public purpose, it was one pursued "by most of the civilized nations of the world." *Id.* at 155.[1] Indeed, "[t]he preference given to the tenant in

[1] The Court of that era drew a sharp distinction between matters affecting the public interest and those only of private concern. The distinction is traced to Lord Chief Justice Hale of England, whose eighteenth century treatise stated that "when private property is affected with a public interest" it "ceases to be *juris privati* only." *De Portibus Maris*, 1 F. Hargrave Law Tracts 78 (1787). This Court adopted this principle in *Munn v. Illinois*, 94 U.S. 113 (1877), declaring that "when private property is devoted to a public use, it is subject to

(continued...)

possession is an almost necessary incident of the policy, and is traditional in English law." *Id.* at 157.

Block is noteworthy, not only for its strong endorsement of tenant protection laws, but because it came at a time when the Court was strictly scrutinizing other forms of land use regulation. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Indeed, *Block* preceded the Court's acceptance of zoning as a permissible form of land use control. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Nor was *Block* an anomaly. Since 1921, this Court has upheld rent and eviction controls on at least six other occasions.[2]

Understandably then, petitioners do not challenge the validity of rent control per se.[3] Indeed, given this Court's recent pronouncements, any such effort would appear to be futile. Nor do they directly challenge mobilehome owners' statutory right to sell their homes in situ, or the owners' protection from arbitrary eviction. For, if this had been the gravamen of their injury, petitioners would have sued the state to enjoin the MRL.[4] They did not,[5] and could not

[1](...continued)
public regulation." *Id.* at 130. The decision in *Block* reaffirms this, and notes that with rental housing, "[a]ll the elements of a public interest justifying some degree of public control are present." 254 U.S. at 156.

[2] *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); and *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

[3] See Petitioners' Brief ("Pet. Br.") at 7.

[4] Cal. Civ. Code § 798, et seq. (Stats 1978, chapts.1031-1035)

[5] Petitioners attempt to fudge the issue of whether their attack is aimed at the Escondido Ordinance, the MRL, or both, by claiming that the Ordinance "either standing alone or in combination with the [MRL]" effectuates the taking. Pet.

(continued...)

because such an action was time barred.[6] Thus, to the extent petitioners are aggrieved by the transfer of possessory interests occasioned by the MRL, the instant case is the wrong vehicle in which to pursue the issue.[7]

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[5](...continued)
Br. at 9, 14. But once they begin to define the actual property interest involved, it is apparent that they have sued the wrong party. Indeed, each of the five "valuable possessory interest[s]" claimed in this case are attributable to the MRL. *See id.* at 6, 9-10 ("the rights to: (1) occupy a mobilehome space in perpetuity, (2) pay below market rent in perpetuity, (3) select the next tenant to occupy the space, (4) fix the successor tenant's effective rent by charging a premium on the sale of the mobilehome coach, and (5) sell, bequeath or pass by intestacy all of these rights"). The only element of this list attributable to Escondido is the below market rents. Notably, however, petitioners do not separately challenge this, but complain that state law makes the feature 2"perpetual." As the court below noted,

> park tenants' . . . rights to 'permanently occupy' the landlord's property . . . derive not from a rent control ordinance but from the state Mobilehome Residency Law which limits the circumstances under which a landlord may terminate a tenancy, imposing a 'good cause' standard. Cert. Pet. at A-18-19.

[6] Petitioners' complaint was filed more than a decade after the MRL was enacted, and thus is beyond the statute of limitations. *See Azul Pacifico v. City of Los Angeles*, __ F.2d__, 60 U.S.L.W. 2321, (9th Cir. 1991) (slip op. at 21); *De Anza Properties v. County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1990).

[7] It may be possible for two or more laws to combine to effectuate a taking, where neither standing alone would be objectionable. But that case is not before the Court. Since the MRL has not been challenged, it is the incremental effect of the Ordinance that must be analyzed. Any other approach would be tantamount to passing judgment on the MRL, something the Court should not do because petitioners have chosen not to sue the State of California nor seek relief against the state Act.

It is highly unusual for this Court to consider a takings clause challenge to a state law where the state is not present to defend it. *See Mahon*, nominally a suit between private parties, but "treated as one in which the general validity of the [Kohler Act] should be discussed." 260 U.S. at 393. In order to do this, however, "[t]he Attorney General of the State [was] allowed to take part in the argument below and [has] submitted [its] contentions here." *Id. See also Loretto v. Teleprompter*, 53 N.Y.2d 124, 132, 440 N.Y.S.2d 843, 846 (1981).

(continued...)

Petitioners strain to contest Escondido's regulatory law and its effect on their property. Their challenge is to a particular aspect of the Ordinance—the prohibition on unlimited rent increases to subsequent tenants.[8] According to petitioners, this causes a "transfer of premium value to departing mobile home tenant, representing value of right to occupy at reduced rate under local mobile home rent control ordinances [sic]."[9] The appropriate analysis for such a claim is the well-established standard for regulatory takings. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

Petitioners also contend the transfer is incident to a permanent physical occupation of land. As such, petitioners hope to subject it to the more rigorous analysis of "possessory takings" as developed in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Thus, critical to petitioners' takings claim is the nature of the challenged governmental action. The "possessory takings" doctrine is a recognition that some interferences with property are qualitatively more serious than others, and cannot usually be justified by countervailing public needs short of compen-

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[7](...continued)
This rule, whether it be jurisdictional or simply a matter of comity, was codified in 28 U.S.C. § 2403 (50 Stat. 751 (1937)). This requires the court clerk to certify to the state and allow participation where "the constitutionality of any statute of that State affecting the public interest is drawn in question," unless the state is already a party. *See Merrill v. Town of Addison*, 763 F.2d 80, 82 (2d Cir. 1985). The presence of the City of Escondido does not satisfy § 2403 as far as the MRL is concerned. *International Paper v. Town of Jay, Me.*, 887 F.2d 338, 340-41 (1st Cir. 1989).

[8] Landlords may seek rent increases necessary to assure a "fair return." Ord. § 4(g). But, they may not impose unilateral rent increases; a feature commonly referred to as "vacancy control." It is this feature that petitioners claim works the taking. *See also Azul Pacifico*, slip op. at 3, 10-11.

[9] Cert. Pet. at i, Questions Presented (No. 1).

sation. However, petitioners' resort to the possessory takings doctrine is based on a simplistic and flawed application of *Loretto*. Not every economic regulation accompanied by occupancy results in a possessory taking. This is particularly true where occupancy does not result from the challenged governmental action.

Also critical to petitioners' case is the identity of the property interest affected by the law. Not all interests in property are protected by the Fifth and Fourteenth Amendments. The answer depends on whether the interest asserted is a "reasonable, investment backed expectation" in light of existing state law. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

Accordingly, two threshold issues emerge in this case: (1) whether the Escondido Ordinance results in or authorizes permanent physical occupation of land; and (2) whether a recognized and discrete property interest is taken from the park owner. Petitioners must establish both of these points in order to prevail on their takings theory. The court below properly rejected the complaint because petitioners cannot establish either of them.

ARGUMENT

I. OCCUPANCY OF RENTAL PROPERTY AT REGULATED RENTS DOES NOT CONSTITUTE A POSSESSORY TAKING

The first suggestion that rent and eviction controls might be analyzed under the possessory taking strand appeared in Chief Justice Rehnquist's dissent from dismissal of appeal in *Fresh Pond Shopping Center v. Callahan*, 464 U.S. 875 (1983). Other than that, no case in this Court has used that analysis. Nor does the instant case necessarily turn on the correctness of *Fresh Pond*, because the cases are sufficiently distinct in key areas. However, the notion

that regulations extending tenancy rights effect a permanent physical invasion would work an unwarranted expansion of existing law.

A. Rent And Eviction Controls Do Not Result In A Permanent Physical Occupation Of Land.

1. This Is Not A Case Of Ouster Nor The Imposition Of An Unwanted Use.

The possessory takings doctrine originated in this Court in early cases where property was seized and owners were "ousted" from possession of their land. Ouster occurs where property is forcibly invaded "so as to effectually destroy or impair its usefulness." *Pumpelly v. Green Bay Co.*, 13 Wall. (80 U.S.) 166, 181 (1872).[10] Later cases extended inverse condemnation theory to governmentally imposed new and unwanted uses on property, accompanied by the physical presence of uninvited users. *Kaiser Aetna*; *United States v. Causby*, 328 U.S. 256, 262-263 (1946). Both variants presuppose impediment to the owner's use and destruction of value in that portion of property occupied. Neither has occurred here.

Third party possession and unwanted use have been essential elements in this Court's possessory takings cases. For instance, not only was the occupying cable company in *Loretto* a "stranger," 458 U.S. at 420, so too was its use of the property. The use was new, unintended, and uninvited. Indeed, had the New York law required the landlord to accept a tenant, rather than a cable attachment, the case

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[10] *Pumpelly* represented the "extremist qualification" placed on the state's police power by the Constitution. *Northern Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878).

would have been decided differently.[11] *FCC v. Florida Power Corp.*, 480 U.S. 245 (1988) demonstrates the importance of this element. Since the challenged act did not "require a power company to dedicate a portion of its pole plant to communications use," 480 U.S. at 251 n.6, *Loretto* did not apply. "It is the invitation, not the rent, that makes the difference." *Id.* at 252. [12]

Eviction laws which extend tenants' right of occupancy beyond the contract term are not "possessions" as that term has been understood in takings jurisprudence. This is true even where continued occupancy may be indefinite.[13] Nor

[11] The Court in *Loretto* specifically distinguished *Block* and *Edgar A. Levy Leasing*, reading those cases as not involving government action which "author-iz[ed] the permanent occupation of the landlord's property by a third party." 458 U.S. at 440.

[12] *See also Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987) (right to exclude applies to "property reserved by its owner for private use"); *id.* at 832 n. 1 (describing *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980) as not involving possession "since there the owner had already opened his property to the general public"). Similarly, in *Munn*, Chief Justice Waite cited numerous examples in English common law where a property owner permitted public use of his property and therefore became subject to price regulation. 94 U.S. at 127-28. For instance, he quoted Judge LeBlanc in *Aldnutt v. Inglis*, 12 East 527, 541 (1810):

> Then, admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance, yet having, as they now have, this monopoly, the question is, whether the warehouses be not private property clothed with a public right, and, if so, the princi-ple of law attaches to them."

The "principle of law" was that the crown might set "reasonable compensation" for the use of the property. *Id.* at 537.

[13] *See* Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis. L. Rev. 925, 1000-1004 (1989) ("Tenant Eviction Protection"). *See also Troy v. Renna*, 727 F.2d 287 (3d Cir. 1984) (upholding eviction law extending tenancies for senior citizens and disabled tenants for as long as forty-eight years); *Help Hoboken Housing v. City of Hoboken*, 650 F.Supp. 793 (D.N.J., (continued...)

does the conclusion change merely because occupancy rights may survive the tenant in possession, and can be transferred to another. The user might not have been hand-picked by the landlord, but the use surely was.[14] By entering into the rental housing business, the landlord has voluntarily yielded certain rights to regulation, notably those associated with possession. Occupation of rented property by tenants is hardly a "strange" use. Rather, it is the very heart of the landlord's "investment-backed expectation."[15]

[13](...continued)
1986) (state may require landlords to place units back onto the market after they have been withdrawn).

[14] The importance of the distinction between new users and new use is illustrated by comparing *Eamiello v. Liberty Mobile Home Sales*, 208 Conn. 620, 546 A.2d 805 (1988), *appeal dismissed*, 489 U.S. 1002 (1989), with *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542 (1989). In the former, the court held that statutory extension of a voluntarily assumed use was "not equivalent to a governmentally sponsored physical invasion." 208 Conn. at 645-46, 546 A.2d at 818. While in the latter, the court ruled that a mandatory rent-up provision was a possessory taking because it "subject[ed landlords'] properties to a use which they neither planned nor desired." 74 N.Y.2d at 105, 542 N.E.2d at 1065, 544 N.Y.S.2d at 548. The court added: "it is the forced occupation by strangers . . . not the identities of the new tenants or the terms of the leases, which deprives the owners of their possessory interests." *Id. See also Casella v. City of Morgan Hill*, 230 Cal. App. 3d 43, 280 Cal. Rptr. 876 (1991)

[15] In *Lindsey v. Normet*, 405 U.S. 56, 72 (1972), this Court noted the "unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment." This supplies another reason for exempting landlord-tenant regulations from strict application of possessory takings doctrine--the evolution of landlord-tenant relationships from one rooted in property law to one that is contractual in nature. *See id.* at 86-87 (the "feudal notion of landlord-tenant law--rooted in the special needs of an agrarian society--has not been a realistic approach to landlord-tenant law for many years, and has been replaced by what eminent authorities have described as 'a predominantly contractual' analysis of leasehold interests") (Douglas, J., concurring and dissenting). *See also Javins v. First National Realty Corp.*, 138 U.S. App. D.C. 369, 373, 428 F.2d 1071, 1075 (1970) ("leases of urban dwelling units should be interpreted and construed like any other contract").

In short, statutory extension of an existing intended use is not tantamount to possession.[16] Instead, what matters is whether the physical occupation is equivalent to ouster---dispossessing the owner of essentially all rights in the occupied property. Here, where petitioners have selected the use and still derive substantial value, their claim of ouster is illusory.

2. A Possessory Taking Will Be Found Only Where Occupation Extinguishes Value In The Property Possessed.

In order to find a possessory taking, possession must result in the extinction of value in that portion of property possessed. *See Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 517 (1987) (Rehnquist, C.J., dissenting). For instance, in *Loretto*, the cable attachment usurped the entire value of the space it occupied.[17] In both *Nollan* and *Kaiser Aetna*, the imposition of easements relegated the owner to the same rights in that property as enjoyed by the public for free. In *Pumpelly*, by occupying

[16] In *Florida Power*, the Court suggested that this was an open question. "We do not decide today what the application of *Loretto* . . . would be if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." 480 U.S. at 289 n.6. However, this referred to the property owner's right to change use, not merely to continue it with a different occupant. *See supra*, n.14. Statutory lease extension has no effect on the landlord's use of the property, nor does it deprive the owner of "control over the timing, extent, or nature of the invasion." *Loretto*, 458 U.S. at 436. The Escondido Ordinance does not mandate any particular use of the property, or even restrict its use. Indeed, both the Ordinance and the MRL specifically authorize termination of tenancies pursuant to a change in use. Ord. §6(a)(6); Cal. Civil Code § 798.56.

[17] The property occupied by the cable company was rendered valueless to the owner. The owner could not occupy that part herself, she could not exclude, and she could not derive benefit either from the user or through sale of the property. Indeed, the regulation "chop[ped] through the bundle [of rights], taking a slice of every strand." 478 U.S. at 435.

the entire parcel's surface, the state took all use and value of the land.

This explains why not all regulation of property incident to physical occupation is analyzed under the possessory takings doctrine. *See Pennell* (apartment rent control not viewed as a possessory taking despite physical occupation by tenants);[18] *Florida Power* (rate regulation of pole attachments analyzed under regulatory takings strand); *Munn* (fixing grain storage rates was permissible).

Petitioners attempt to mold the instant case into a possessory taking by claiming both possession and complete extinction (through transfer) of value. But, even if tenant occupancy constitutes "possession," the possession and the lost value are of different things. The possession is of a physical space—the mobilehome pad. On the other hand, the transfer is of a noncorporeal interest—the right to inflated profits through higher rent. Even accepting that this interest has been completely transferred, it is neither physically discrete nor coterminous with the possession.[19] The landlords' rights in the physical space, the proper inquiry in possessory cases, are hardly extinguished. Not only does the pad retain substantial value, its continued rental meets the landlords' expectations.

Were the rule otherwise, physical presence alone would become talismanic under the takings clause. Yet, other cases in this field have focused on the extent of regulation, and required substantial deprivation to find a taking. The point is illustrated by comparing *Pruneyard*

[18] Justice Scalia, who reached the takings issue in *Pennell*, rested his separate opinion on regulatory takings theory, and did not suggest that indefinite occupation by tenants required a possessory takings analysis. 485 U.S. at 15.

[19] Nor is it fractionable for Fifth Amendment purposes. *See infra*, p. 26.

with *Kaiser Aetna*. Both cases involved the unwanted physical presence of strangers. Also in both, the property owner was deprived of the right to exclude, one of the "essential sticks in the bundle of property rights." *Kaiser Aetna*, 444 U.S. at 179-180. Yet, in the former, the interest taken had no appreciable value, nor did it affect the property's use (*Pruneyard*, 447 U.S. at 83), while in the latter, "petitioners had invested millions of dollars" (*Kaiser Aetna*, 444 U.S. at 169), whose recapture through rents was cut off by the presence of non-paying users.[20]

Since petitioners are not deprived of either use or value in the physical property occupied by tenants, they cannot state a claim for a possessory taking.

B. Mobilehome Rent and Eviction Controls Do Not Extinguish Possessory Interests

This Court has identified three essential rights in property: to possess, use, and dispose. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). While petitioners' right to possess is constrained, it is by their own voluntary action in devoting the property to rental use in

[20] Any suggestion that *Pruneyard* stands apart from other possessory takings cases solely because the use was temporary rather than permanent (*see Loretto*, 458 U.S. at 434), is undercut by later cases that have rejected a distinction between temporary and permanent takings. *See Nollan*, 483 U.S. at 832, ("a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and from, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises"); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (temporary taking was compensable). Rather, *Pruneyard* found against a possessory taking because "appellants have failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'" 447 U.S. at 84. The present case is directly apposite.

the first instance, not through invasion by the state. Moreover, petitioners retain essential reversionary interests.

1. A Mobilehome Owner's Right To Sell His Coach On Site Does Not Deny The Park Owner Reversionary Rights

A mobilehome owner's bare right to sell his coach on site abrogates little if any possessory rights the landlord has in the property. It constitutes neither permanent nor indefinite occupation because the landlord's reversionary rights remain intact. He may evict for customary business reasons,[21] change the park's use (subject to generally applicable use restrictions),[22] or terminate the use.[23] The only reversionary right arguably taken from the landlord is the ability to select the next tenant. However, the landlord still retains essential rights of prior approval.[24]

In this regard, the MRL is no more intrusive than the developing common law rule regarding lease assignment.[25]

[21] *See, e.g.*, Cal. Civil Code §798.56 (violation of lease, park rules, non-payment of rent); Cal. Civil Code §798.61 (abandonment); Cal. Civil Code §798.73 (old or rundown coaches).

[22] Cal. Civil Code §§ 798.10, 798.56.

[23] *Loretto* rejected the defense that invasion by cable was acceptable because the landlord retained the right to withdraw the building from rental service. 458 U.S. at 439 n.17. That was seen as an unconstitutional condition because there was no substantial nexus between the condition (cable presence) and use (rental business). *See Nollan*, 483 U.S. at 838, 841. Here, however, the condition (rental use by tenants) is not only related to, but is, the use. Accordingly, the conferred statutory right of tenancy in a mobilehome park is precisely the use which the landlord has made of his property. He may terminate the use, and the user, without having to sacrifice any property rights.

[24] *See* Cal. Civil Code §798.74.

[25] In California, restrictions on commercial lease assignment may be void as contrary to public policy. This flows from the rule prohibiting restraints on alienation. *Kendall v. Pestana*, 40 Cal. 3d 488, 709 P.2d 837, 220 Cal. Rptr. 818 (1985) (consent to lease assignment may not be unreasonably withheld).

(continued...)

Restrictions on the ability to exclude, which have figured prominently in other contexts, do not implicate important property rights where possession by others is the very essence of the use made by the owner. *Cf. Loretto*, 458 U.S. at 434 ("the owner [in *Pruneyard*] had not exhibited an interest in excluding all persons from his property"). State intervention, including limitations on owners' ability to select or arbitrarily exclude tenants, is as unremarkable in the heavily regulated rental housing business as it is with innkeepers. Anti-discrimination statutes and common law rules already circumscribe landlords' ability to reject tenants for non-business reasons.[26]

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[25](...continued)
See also Prestin v. Mobil Oil Corp., 741 F.2d 268 (9th Cir. 1984). For other jurisdictions adopting this rule, *see Kendall*, 709 P.2d at 841, 220 Cal. Rptr. at 822; Annot., 21 A.L.R.4th 188 n.9 (1983). *See also* R. Powell & P. Rohan, *On Real Property*, 246[1] (1988) ("[w]ith the shortage of housing and, in many places, of commercial space as well, the allowance of lease clauses forbidding assignments and subleases is beginning to be curtailed by statutes"). At least one court has equated the developing rule on lease assignment with the transferability of mobilehome occupancy rights. *See Eamiello*, 208 Conn. at 646, 546 A.2d at 818.

[26] In *Hall*, the court declared that the landlord's right to select tenants was "an important attribute of ownership." 833 F.2d at 1279 n.23. Yet, in the heavily regulated area of landlord-tenant relationships, a plethora of statutory and judicial developments have constrained the landlord's ability to reject tenants. *See, e.g.*, Fair Housing Act, 42 U.S.C. §3601-3631 (1982); *Eamiello*; *Tirolerland v. Lake Placid 1980 Olympic Games*, 592 F.Supp. 304, 316 (N.D.N.Y. 1984) (rejecting taking challenge to ordinance limiting room rates and tenant eligibility; "the Court has serious doubts whether an interference with the right to select one's tenants can amount to an unconstitutional taking"). *See also Schweiso v. Williams*, 150 Cal.App.3d 883, 198 Cal.Rptr. 238 (1984) (in lease assignment cases, "denying consent solely on the basis of personal taste, convenience or sensibility or in order that the landlord may charge a higher rent than originally contracted for have been held arbitrary reasons failing the tests of good faith and reasonableness").

2. Monetized Rent Savings Do Not Constitute A Possessory Interest

The court in *Hall* distinguished the Santa Barbara ordinance from apartment rent control on the ground it enabled an outgoing tenant to "liquidate" his rent savings "and take [it] with him when he leaves the property." 833 F.2d at 1279. Petitioners similarly argue that the Ordinance transfers a possessory interest which the tenant reduces to money when selling his home. Pet. Br. at 14. Yet, the economic benefit conferred by Escondido is below market rents, not possession.

The benefit of rent control is no more a possessory interest than any other situation where cost savings accompany possession. If price control is not itself unconstitutional, the fact that a consumer realizes a monetary benefit after his use and possession of a commodity terminates should not compel a different conclusion. Otherwise, any mechanism which controlled wholesale but not retail prices would be unconstitutional, because the retailer could pocket the "monetized" value of the wholesale price reduction when reselling the item at an unregulated price.[27] Indeed, the mobilehome owner's ability to "liquidate" below market rents when he leaves the property is remarkably similar to a homeowner's ability to capitalize below market interest rates into the sales price of his house, which he could do by transferring the mortgage to the purchaser. *See Wellenkamp*

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[27] Although the precise issue has not been addressed by the Court, many of the price control schemes upheld against due process and takings challenge appear to have had this feature and effect. *E.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (fixing maximum wholesale price of natural gas); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966) (upholding a New York law imposing maximum wholesale prices while decontrolling retail prices). In each case, the regulatory beneficiary acquired possession of goods at reduced prices. He was also able to transfer possession at an unregulated price, thereby reaping the difference.

v. Bank of America, 21 Cal. 3d 943, 148 Cal. Rptr. 379, 582 P.2d 970 (1978).[28] In short, if it is not a taking to authorize a tenant to remain on the property at reduced rents indefinitely, it is hard to understand how it becomes a taking when the tenant leaves.

3. Permanent Physical Occupation, If Any, Is Caused By The MRL; It Is Not Attributable To Escondido

Petitioners contend that a taking results from the combined effect of the Escondido Ordinance and the MRL. No serious contention can be advanced that the Ordinance, by itself, authorizes physical occupation, creation or alienation of leasehold, or any other possessory rights. Rather, any such restriction on petitioners' right or title existed at the time the Ordinance was enacted.[29]

This Court has been clear that government action alleged to cause a taking must be measured against the backdrop of existing law and title. In *Boston Chamber of Commerce v. Boston*, 217 U.S. 189 (1910), the Court refused to order compensation to a fee owner when a pre-existing easement had already affected the value of the fee. "The Constitution . . . does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole." *Id.* at 195.

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[28] The homeowner's right was judicially recognized when the California Supreme Court ruled that a mortgage due-on-sale clause was an impermissible "restraint on alienation," and therefore unenforceable. In *Fidelity Federal Savings And Loan Association v. de la Cuesta*, 458 U.S. 141 (1982), this Court held the *Wellenkamp* rule was preempted by federal law.

[29] Indeed, according to the Court in *Azul Pacifico*, it is not necessary for the vacancy control provisions of the Ordinance to be ever implemented. "[T]here would be a taking even if, for some reason, *no* coaches were sold following passage of the ordinance." __F.2d at __ (slip op. at 18) (original emphasis).

Whether a law extinguishes ownership rights or otherwise goes "too far" depends upon the uses available without the challenged restriction. Here, absent the Ordinance, petitioners might be able to collect higher rents, but they would exercise no more control over possession than they do now.[30] *See Eamiello; Thompson v. Merlino*, 208 Conn. 620, 545 A.2d 1094, *appeal dismissed*, 488 U.S. 1024 (1989).[31] The most that can be said about the Ordinance is that it marginally effects value; hardly an unusual or unconstitutional feature of land use regulation.

II. THE INTEREST PETITIONERS CLAIM TO HAVE BEEN TAKEN AND TRANSFERRED TO TENANTS IS NOT COMPENSABLE.

A. Appreciated Site Value Does Not Constitute Fifth Amendment Property.

Petitioners' theory relies heavily on the mobilehome owners' ability to capitalize future rent savings. Such savings reflect the difference between market and controlled rents. *Azul Pacifico*, __F.2d at __ (slip op. at 11). Rent control in Escondido, as elsewhere, does not actually set

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[30] It has been suggested by some that the Escondido Ordinance is invalid, not because it causes a taking, but because it prevents park owners from obtaining just compensation for the taking caused by the MRL. If this be the case, suing Escondido for damages makes no more sense than holding the California Supreme Court liable after *First English*, for that court's refusal to allow damages in inverse condemnation.

[31] The Court in *Azul Pacifico* distinguished these Connecticut cases on the ground they involved protected tenancy, but not rent control. __ F.2d at __, (slip op. at 9 n.3). Actually, Connecticut does limit rent increases in a manner that may be operationally similar to the Escondido Ordinance. *See* Note, *Mobile Home Parks and Connecticut's Regulatory Scheme: A Takings Analysis*, 17 Conn. L. Rev. 811, 830 n.101 (1985) ("Mobile Home Parks") ("[b]ecause [Connecticut's] statute is designed to prevent the park owner from depriving the home owner of his home's increase in value secured by its location in a mobile home park, increased rents intended to recover that value would be prohibited").

rents, but imposes ceilings on rent increases. Thus, at the inception of controls, market and regulated rents are roughly equivalent.[32] Any site value resulting from a mobilehome's placement in the park is presumably incorporated into market rents and captured by the landlord.[33] As market rents escalate with appreciation in property value, or in response to increasing space scarcity,[34] and permitted rent increases fail to keep pace, "rent savings" are created. Petitioners claim the Ordinance capitalizes the savings over the anticipated life of the use, generating a "windfall" for the departing mobilehome owner. The question in this case is whether the state may lawfully repose this additional appreciated value in the mobilehome owner, or whether it is naturally and constitutionally the exclusive property of the landlord.[35]

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[32] The Ordinance contains a rent roll-back provision which sets "base rent." Ord. § 3. This is typical in newly enacted rent control laws. Its purpose is to restore rents to hypothetical equilibrium conditions; i.e., to approximate market rents. The theory is that contract rents can exceed market rates if landlords raise rents in anticipation of rent control, or if vacancy rates are so low as to give rise to monopoly conditions. *See Oceanside Mobilehome Park Owner's Ass'n. v. City of Oceanside*, 157 Cal. App. 3d 887, 906, 204 Cal. Rptr. 239, 251 (1984); Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 Rutg. L. Rev. 721, 766-67 (1983).

[33] See Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobilehome Context: Placement Values and Vacancy Decontrol*, 35 U.C.L.A. L. Rev. 399, 426-28 (1988).

[34] Amici agree with respondent that the rents which would obtain absent rent control are not "market rents" at all, but artificially high rents due to virtual landlord monopoly. The principal purpose of rent control is "to restore free market conditions by limiting rent increases to the level which would occur under general market conditions—a competitive market as opposed to a monopolistic or oligopolistic one." *Oceanside*, 157 Cal. App. 3d at 905, 204 Cal. Rptr. at 251. *See also* 4 Sackman, *Nichols' The Law of Eminent Domain* (1990), p.12B.71 ("Law of Eminent Domain").

[35] As noted above, rents the parkowner could charge absent rent control might reflect exploitive conditions as well as appreciated value. There can be little

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Property rights, as a general rule, are neither created nor defined by the constitution. "They are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984). Of course, once having created a property interest, the state is not at liberty to expunge it in derogation of reasonable investment backed expectations. But, unless preexisting state law guarantees property owners a right to profit from future appreciation, that anticipated gain does not constitute Fifth Amendment property. "Frustration and appropriation are essentially different things." *United States v. Grand River Dam Authority*, 363 U.S. 229, 236 (1960).

1. Appreciation Is The Result Of Governmental Land Use Decisions; Appreciated Value Is Created By The State.

The bottom line of petitioners' complaint is that the Ordinance prevents them from obtaining compensation for the full appreciation of the sites in their parks, as measured by increased rents. That very appreciation, however, is driven by a scarcity of mobilehome sites which itself is a consequence of local land use regulation. Restrictive zoning policies can and do lead to monopoly or near-monopoly powers among owners of mobilehome parks.[36] "The

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[35](...continued)
Fifth Amendment claim to such rent levels. *Casella*, 230 Cal.App.3d at 54, 280 Cal. Rptr at 882-83. Moreover, even under petitioners' theory, the Ordinance does not transfer all appreciated value. Rather, the bulk of the appreciation is due to alternative potential uses of the land, and is unaffected by limitations on rent. If and when the land is converted to a higher use, which may lawfully occur, the property owner is likely to realize this inchoate appreciation. *See* Shulman, *Real Estate Valuation Under Rent Control*, 9 Am. Real Est. & Urb. Econ. Ass'n J. 38 (1981).

[36] See *Cider Barrell Mobile Home Court v. Eader*, 287 Md. 571, 574, 414 A.2d

(continued...)

mobile home market is an example of a monopoly, which is a market failure, rather than a market, and is a prime candidate for government regulation." *Azul Pacifico v. City of Los Angeles*, 740 F. Supp. 772, 781 (C.D. Cal. 1990).

In another rent control case, this Court noted that "Government may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly . . . ." *Pennell*, 485 U.S. at 11. Here, local land use policies have created conditions that enable the park owners, absent rent control, to capture the attendant monopoly profits and deplete the tenants' equity. There can be no question that the government can intervene to ameliorate this situation.[37]

The state having created the possibility for appreciation through legislated scarcity, can permit the landlords, the tenants, both, or neither to capture any appreciation that

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[36](...continued)
1246 (1980); Baar, *The Right to Sell the 'Im'mobile Manufactured Home in its Rent Controlled Space in the 'Im'mobile Home Park: Valid Regulation or Unconstitutional Taking?* 24 Urban Lawyer No. 2 (forthcoming, 1992); *Mobile Home Parks*, *supra*, n.31, at 812.

[37] Prior to enactment of the MRL, it was widespread practice in California for park owners to "tie" space rental to mobile home purchases in an effort to exploit space scarcity. *See, e.g., Suburban Mobile Homes, Inc., v. Amfac Communities, Inc.*, 101 Cal. App. 3d 532, 161 Cal. Rptr. 811 (1980) (tying arrangement by park owner and mobile home dealers violated state antitrust law); *People v. Mobile Magic*, 96 Cal. App. 3d 1, 157 Cal. Rptr. 749 (1979) (conditioning the rental of sites on the purchase or lease of mobile homes from certain retail dealers was illegal); *Sherman v. Mertz*, 42 Cal. App. 3d 769, 117 Cal. Rptr. 188 (1974) (agreement between park owner and mobile home dealers providing kick back of profits from tied mobile home sale and space lease were in restraint of trade); *Jomicra v. California Mobile Home Dealers' Ass'n*, 12 Cal. App. 3d 396, 90 Cal. Rptr. 696 (1970) (describing growing practice of "closed parks" where entry is conditioned on purchase of home from approved dealers, raising "a serious issue of illegal conduct to restrain trade and competition"). *See also Ware v. Trailer Mart, Inc.*, 623 F.2d 1150 (6th Cir. 1980) (reversing summary judgment for park owner on allegation that defendant violated Clayton Act by illegal "tie-in" arrangement).

may exist. Thus, the state could impose resale price controls on on-site sales of mobilehomes; then, no one would receive the "premium." The state could require that the landlord and tenant split any appreciation upon sale of a mobilehome. The state could enact vacancy decontrol, allowing the landlords to capture the entire "premium."[38] Or, the Escondido system could prevail.

Any of these choices would be constitutional, and all for the same reason: potential site appreciation is not anyone's constitutional entitlement.

> In choosing the tenant rather than the mobile home park operator as the recipient of this economic advantage arising from the near-monopoly status of the industry, the legislature, by allocating its benefit to those who generally are more in need, has not violated any constitutional principle.

Eamiello, 546 A.2d at 820.[39]

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[38] Indeed, the parkowner could capture more than the site value of the pad. Because the mobilehome is captive, the landlord's superiority of right enables him to enhance his own profit through depletion of the homeowner's equity. *Azul Pacifico*, 740 F. Supp. at 744. This has led to exploitive conditions. *See Stewart v. Green*, 300 So.2d 889, 892 (Fla. 1972) ("a form of economic servitude ensues rendering tenants subject to oppressive treatment in their relations with park owners"); *Mobile Home Parks*, *supra*, n.31, at 815 (describing how some evicted owners have lost the full value of their homes); Note, *Mobilehomes: Present Regulation and Needed Reforms*, 27 Stan. L. Rev. 159, 166-67 (1974) (landlord abuses can "destroy the homeowner's equity in his unit"); *Tenant Eviction Protection*, *supra*, n.13, at 965 n.223. Hawaii responded to a similar situation with its Land Reform Act, Haw. Rev. St. Ch.516 (1967 Haw. Sess. Laws 488), upheld in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

[39] In *Penn Central Transp. Co. v. New York*, 42 N.Y.2d 324, 328, 366 N.E.2d 1271, 1273 (1977), the New York Court of Appeals excluded "the publicly created components" of property value in its takings analysis. This Court noted, but did not rest its decision on, this approach. *Penn Central*, 438 U.S. at 121 n.23. *See also Gateway Apartments v. Nutley*, 605 F.Supp. 1161, 1163 (D.N.J.

(continued...)

To say that this appreciation is a property right that may not be taken without compensation is to make government the guarantor of anticipated gains. This is not the law. *Andrus v. Allard*, 444 U.S. 51, 66 (1979) ("perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests"); *Penn Central*, 438 U.S. at 130 (holding "untenable" the proposition that landowners may establish a taking "simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development"); *United States ex rel T.V.A. v. Powelson*, 319 U.S. 266, 282 (1943) ("in the absence of a statutory mandate . . . the sovereign must pay only for what it takes, not for opportunities which the owner may lose").[40] Reposing the gain elsewhere, as would occur with substantial capital gains taxes or resale price controls, does not take from the property owner any constitutional entitlement he had.[41]

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[39](...continued)
1985) (state could require landlords to pass 75% of any property tax rebates through to tenants, since the monies were not pre-existing landlord property. Otherwise, it "would result in a windfall to landlords and deny to tenants the right to participate in a refund which they in large measure created").

[40] Anticipated future gain is generally excluded for valuation purposes in condemnation proceedings because it is too speculative. *General Motors*, 323 U.S. at 379 ("compensation . . . does not include future loss of profits . . . or other like consequential losses"). *See generally Law of Eminent Domain*, *supra*, n.34, at Vol. 5, pp.19-7, 19-31.

[41] In essence, petitioners seek to socialize their losses, while privatizing their gains. Fortunately, the Fifth Amendment is not so uni-directional. *See generally* D. Hagman, *Windfalls for Wipeouts*, 18 (1978) (in "recapturing windfalls . . . [t]he community is asking only for a return of wealth it creates").

2. The Owner's Loss, Rather Than Another's Gain, Determines Whether A Taking Has Occurred.

Petitioners' theory of a windfall transfer to homeowners focuses on the wrong end of the equation--what the government has gained, rather than what the owner has lost. Indeed, in *Azul Pacifico*, the court found and measured a taking by reference to the homeowner's increased equity in his mobilehome.[42] There are two reasons why this is error.

First, from the parkowner's perspective, mobilehome rent control, even in conjunction with the MRL, is operationally the same as apartment rent control. With both, the landlord operates his property at regulated rents and with reduced control over tenant tenure.[43] Although the MRL gives tenants a qualified right to select successors, this has little if any impact on landlord's use or expectations.

Second, the fact that departing tenants realize transient rent savings after their tenancy does not equal loss to the parkowner. *General Motors*, 323 U.S. at 378 ("deprivation of the former owner rather than accretion of a right or interest to the sovereign constitutes the taking"). Indeed, absent the MRL, the only way the landlord could capture

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[42] The approach in *Hall* and *Azul Pacifico*, of measuring damages by the tenant's gain, rather than the landlord's loss, is contrary to law. *Kimball Laundry v. United States*, 338 U.S. 1, 5 (1948) ("[b]ecause gain to the taker . . . may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation"). *See also Law of Eminent Domain*, *supra*, n.34, at §12.03. Indeed, the trial court in *Azul Pacifico* noted that "*Hall* break[s] from the traditional 'loss' measure of damages for takings cases," but was nevertheless constrained by the Ninth Circuit rule. 740 F.Supp. at 778.

[43] *Nollan* illustrates this equivalence. There, transient and fungible beachgoers constituted "permanent" occupiers because, from the owner's perspective, their changing identity was irrelevant to his loss. 483 U.S. at 831-32. By a similar token, the fact that a succession of users enjoy eviction protection under the MRL, rather than just the tenant in possession, does not alter the analysis.

site premium is by engaging in illegal or exploitive practices. *See supra*, *n.*37, 38.

In essence, petitioners complain that mobilehome owners get too high a price for their homes upon sale; that some of the purchase price results from restrictions on the park owners' property. Of course, a similar complaint can be heard from any property owner where restrictions on his use enhance the value of neighboring property.[44]

B. Appreciated Site Value Is Not A Discrete And Severable Property Interest; It Cannot Be Analyzed In Isolation.

1. Intangible Property Interests Are Not Fractionated In Takings Cases.

In an effort to paint this as a possessory takings case, petitioners contend that the Ordinance transfers a discrete, severable, and marketable interest to tenants, to wit: appreciated site value. Such an attempt to segregate this intangible component of value from the remainder of their property interest must fail.

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[44] In this regard, property rights are often complementary. Enhancement of one parcel means devaluation of another. This has not been sufficient to make out a takings claim at least since the advent of zoning. Nonetheless, petitioners suggest that regulation is permitted under the takings clause only where reciprocity of advantage occurs. Theirs is an unwieldy principle, requiring that each legislative act provide equal benefit. Professor Michelman has the better view, that due process requires only "an acceptable level of assurance that over the life of a society (and within the expectable lives of any of its members) burdens and benefits will cancel out leaving something over for everyone." Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1179 (1967). *See also Keystone*, 480 U.S. at 491 n.21. Land owners in general, and mobilehome park owners in particular, receive substantial economic benefit from tax, land use, and other legislative choices.

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . . *Penn Central*, 438 U.S. at 130.[45]

The ramifications of fractionating property interests when undertaking a takings analysis are severe. If a conceptual interest in property can be viewed in isolation from the property as a whole, then any regulation which extinguishes or severely restricts that interest will constitute a taking. *See Keystone*, 480 U.S. at 498.

The rule is different in the case of discrete physical property because each segment, no matter how small, embodies the full bundle of rights we commonly call property. *General Motors*, 323 U.S. at 377-78. *Cf. Loretto*. Thus, each case in this Court where fractionating was allowed involved tangible property. However, particular interests in property, such as the rights to alienate (*Andrus*) or earn higher returns (*Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989)), are never fractionated.[46] *Keystone*, 480 U.S. at 497-98 (taking analysis does not divide property into discrete segments; rather it examines interference with

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[45] *Penn Central* goes even further than necessary for this case. While the Court recognized that appellants' air rights constituted an established property interest that could be separably transferred (*id.* at 130, 137), and was transferred, this factor was not relevant in assessing appellants' takings claim.

[46] This distinction also reinforces the special character of physical invasion of tangible property, because all rights in the property so occupied are lost. *See supra* p. 12. Yet, non-possessory interferences still leave viable economic use.

property rights in the parcel as a whole); *Andrus*, 444 U.S. at 65-66 (the property subject to regulation must be viewed in the aggregate; denial of one property right does not constitute a taking).[47] Petitioners ask this Court to treat the instant case as if it were a routine possessory takings case where discrete physical property is invaded by a stranger. However, the property petitioners claim has been expunged by the Ordinance is not the pad space at all, but the intangible right to collect higher rents. This right cannot be severed from the remainder of petitioners' property for takings analysis.[48] It is neither an identifiable segment of physical property nor a distinct estate in land recognized by law. Petitioners' attempt to mix possessory and regulatory takings concepts is pernicious and should be rejected.

2. Monetized Future Rent Savings Are Not A Discrete And Marketable Property Right

A second reason augurs against treating the so-called transferred site value as a discrete property interest. It simply is not. While homeowners may be able to incorporate the capitalized value of future rent savings into the on-site price of their homes, the interest is not discrete,

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[47] The Court has split in cases such as *Penn Central* and *Keystone* where discrete physical property was rendered valueless by regulation. The outcome of that debate is not relevant here since the property interest petitioners claim is intangible. It is only one stick in a full bundle of rights retained by petitioners. *Andrus*, 444 U.S. at 65-66. Of course, intangible property can be destroyed by possession if governmental action takes all value. *See Ruckelshaus; Hodel v. Irving*, 481 U.S. 704 (1987). While *Hodel* involved only one stick—the right to devise—in the context of that case, that right represented all value. Indeed, its taking resulted in complete loss of the property through escheat. *See Kirby Forest Ind. v. United States*, 467 U.S. 1, 15 (1984).

[48] For instance, in *Duquesne*, the Court refused to segregate a utility's investment in an uncompleted power plant. Rather, it looked to the effect of rate regulation on the business as a whole. 488 U.S. at 313-14.

severable, or marketable by itself. Notwithstanding statements in *Hall* and *Azul Pacifico*, it is the coach that is sold, not the "interest."[49] Petitioners also do not allege that at any time before or after the Ordinance they treated this monetized value as a discrete property interest, or that they could have marketed it.

C. Any Taking That May Have Occurred Has Been Fully Compensated

According to the Ninth Circuit in *Azul Pacifico*, "the taking occurred when the ordinance was passed." __ F.2d at __ (slip op. at 17) n.7.[50] Consequently, compensation must be measured as of that date. *Id.* at __ (slip op. at 20); *De Anza*, 936 F.2d at 1085. While the court was conceptually correct in these matters (*see Law of Eminent Domain, supra*, n.34, chapt. 12A), it failed to recognize that there was no "vacancy-control premium" when the rent control law was enacted and "the taking occurred."

As argued above,[51] controlled and market rents are equivalent at the inception of rent control. At that time, there are no rent savings; hence, no value in vacancy decontrol.[52] In other words, rents collected on the base

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[49] Proof of this point is found in petitioners' anecdotal citation to an incoming tenant purchasing a mobilehome and immediately selling it for a substantial loss. "The use of the land was what I paid for more than the [coach]." Pet. Br. at 10. The new tenant was unable to buy the right of occupancy by itself because it is not a discrete or separately marketable property right.

[50] The court explained: "[t]he ordinance assigned to all of the tenants then on the property the right to capture the full discounted value of occupying indefinitely . . . property at below-market rent. . . . [S]ubsequent coach sales by tenants are irrelevant to the question of how much was taken from the landlord." Id. at _ (slip op at 18).

[51] *See supra*, p. 19.

[52] The option to raise rents in the future may be one of the many components (continued...)

date (set by the landlord himself), and the right to a "fair return" thereafter, provide the landlord with a full measure of compensation for any rights he has lost.[53]

The right of occupancy acquires value with time as land appreciation outpaces permitted rent increases. But, by then, according to the *Hall* theory, the right belongs to the tenant. Appreciation which occurs subsequent to the taking is not compensable.

CONCLUSION

For the foregoing reasons, amici urge this Court to uphold the decision of the California Court of Appeal.

Respectfully submitted,

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[52](...continued)
of overall value in income producing property. However, it is difficult if not impossible to quantify this "option value." Hence, it is excluded from condemnation awards, lest such "speculation and conjecture . . . convert an eminent domain proceeding into a guessing contest." *Law of Eminent Domain, supra*, n.34, at p.12A-2. *See also id.*, at p.12B.11 ("[r]ental value based on the increased value of the property that is occasioned by the prospective condemnation has been excluded, as have future estimated rentals"). Moreover, the option hasn't been entirely lost; only the ability to raise rents above allowed increases (i.e., a "fair return"). This seems even less capable of prediction or quantification. *See id.*, at 12B-66 ("capitalization of hypothetical income . . . has generally been rejected").

[53] *See Law of Eminent Domain, supra*, n.34, at p.12B.10 ("actual rent reserved . . . forms one of the best tests of value"); *Rivera v. R. Cobian Chinea*, 181 F.2d 974, 979 (1st Cir. 1950) (Magruder, C.J., dissenting) ("the 'just compensation' called for would be the equivalent of" the rent paid by the tenant).

PROOF OF SERVICE BY MAIL

State of California
County of Los Angeles ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; That my business address is 11852 Santa Monica Boulveard, Suite 3, Los Angeles, California 90025; that on January 3, 1992, I served the within *Brief Amicus Curiae* in said action or proceedings by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 3, 1992 at Los Angeles, California.

Peter Sandanavicius
(Original Signed)